SUPREME COURT, U. S

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1121

NORTH GEORGIA FINISHING, INC.,
Petitioner,

versus

DI-CHEM, INC.,
Respondent,

THE FIRST NATIONAL BANK OF DALTON,
Garnishee.

On Petition for Writ of Certiorari from the Supreme Court
Of The State of Georgia In Its Case No. 28,217

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINION BELOW

The opinion in question is that of NORTH GEORGIA FINISHING, INC., Appellant, v. DI-CHEM, INC., Respondent; First National Bank of Dalton, Garnishee, Case No. 28217 (pp. 13-24 Appendix to Petition for Certiorari).

JURISDICTION

Petitioner invokes jurisdiction of this Court because jurisdiction is "believed to exist" under Title 28, United States Code, Section 1257 (pp. 1 and 2 of Petition). Respondent denies that jurisdiction exists under said provision.

STATUTE INVOLVED

Georgia Code Title 46, Section 101, is alleged to be unconstitutional.

QUESTIONS PRESENTED

(1) WHETHER THERE WAS ANY GARNISHMENT PROCEEDING PENDING AT THE TIME PETITIONER ALLEGES IT ATTACKED THE CONSTITUTIONALITY OF THE GEORGIA GARNISHMENT STATUTE.

(2) WHETHER THE GEORGIA GARNISHMENT STATUTE WAS AND IS UNCONSTITUTIONAL *IN EVERY GARNISHMENT CASE* INSOFAR AS IT PROVIDES FOR THE TAKING OF PROPERTY WITHOUT PRIOR NOTICE AND HEARING.

STATEMENT OF FACTS

On August 20, 1971, the Respondent instituted this case in the Superior Court of Whitfield County, Georgia against Appellant, North Georgia Finishing, Inc.,

suing on open account for $51,279.17. North Georgia Finishing was a Georgia corporation, and a wholly owned subsidiary of a non-Georgia corporation. On August 20, 1971, Di-Chem, Inc. filed with the Clerk of the Superior Court of Whitfield County, Georgia, an Affidavit and Bond for Garnishment pursuant to Georgia Code Title 46, Sections 101 and 102. The Affidavit for Garnishment stated that Respondent had reason "to apprehend the loss of the sum of $51,279.17 unless process of garnishment issue". A bond was also filed by Respondent in double the amount sued on, agreeing to "pay all costs and damages that Appellant might sustain in consequence of suing out said garnishment in the event plaintiff failed to recover in said suit, or in the event the amount sworn to be due on said judgment is not due, and in the event that the property or money sought to be garnisheed is not subject to garnishment process". This garnishment was served on the First National Bank of Dalton on August 20, 1971. Counsel for Petitioner states in his statement of the case that the money garnisheed "constituted the payroll account" of Appellant. Such does not appear anywhere in the Record in this case. Apparently, Appellant was notified of this garnishment on August 20, August 21, or August 22, 1971, because on the 23rd day of August, 1971, Appellant posted a dissolution bond as required by law. On the 23rd of August, 1971, the Judge of Whitfield Superior Court signed the following order:

> "It appearing to the Court that the defendant in the within case has filed a proper dissolution bond dissolving the within garnishment,

it is thereupon considered, ordered and adjudged that said garnishee, the First National Bank of Dalton, Dalton, Georgia, be hence discharged.

This 23rd day of August, 1971.

/s/ Robert L. Vining, Jr.
J. S. C. C. C."

On the 15th day of September, 1971, more than twenty (20) days after Appellant filed a Dissolution Bond, discharging the Bank garnishee, the Appellant filed a Motion to Dismiss the garnishment as being unconstitutional and for other technical reasons. An order was taken from the Judge on November 29th overruling the Motion to Dismiss. The overruling of this Motion was in due course appealed to the Court of Appeals of Georgia and then certioraried to the Supreme Court of Georgia. Both Courts affirmed. The opinion of these courts are set out in full in Appellant's Petition for Certiorari.

ARGUMENT AND LAW

Certiorari should be denied in this case because the opinion of the Supreme Court of the State of Georgia is not erroneous as Petitioner has not been denied due process of law, or equal protection under the Constitution of the United States.

(1) As shown in the Statement of Facts the garnishment was served on August 20, 1971. Petitioner filed

a Dissolution Bond on August 23, 1971. The Court stated in its Order of August 23, 1971, "the defendant (now petitioner) has filed a proper dissolution bond dissolving the within garnishment." A motion was made on the 15th of September, 1971 to dissolve a garnishment which had already been dissolved by Court order some three weeks before!

The Georgia case of *Roberts v. Seanor,* 46 Ga. App. 5, 3 (1932) held:

> "The dissolution bond takes the place of the property or fund garnisheed, and is conditioned to pay whatever judgment might be obtained against the garnishee or the funds sought to be impounded."

(2) Petitioner contends that Georgia Code Title 246 (should be 46), § 101, insofar as it provides for the taking of property without prior notice and hearing through Process of Garnishment where suit shall be pending but before judgment, is unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. To this, we cannot agree! This is not a suit where wages or property of an individual is being garnisheed. This is a suit by one corporation against another corporation! Petitioner makes the statement that petitioner's payroll account was garnisheed. There is no evidence in the Record as to this! Respondent may well need this money for its payroll!

This counsel strongly feels that individual rights should always be protected. However, we feel that the pendulum has swung too far in favor of the debtor! Petitioner is a Georgia corporation and was wholly owned by an out-of-state corporation. Assuming Petitioner was insolvent, what was to prevent it from transferring, after notice of a hearing, all of its funds out of the state or concealing them so as to make it judgment proof? Respondent in its Affidavit for Garnishment swore "that it — has reason to apprehend the loss of said sum of $51,279.17 unless process of garnishment issue."

Counsel for Petitioner in its Motion to Dismiss the Garnishment plead:

> "Said plaintiff in garnishment had no reason to apprehend the loss of any part of any judgment that he might obtain against the defendant in garnishment, and therefore, had no grounds upon which to base said Writ of Garnishment."

The Court overruled this Motion as well as the due process objection. It can be inferred that there was a strong, valid reason for the garnishment, and that the trial court heard the reasons for Petitioner apprehending the loss of $51,279.17.

It may be true that Petitioner would be harmed by garnisheeing its bank account. Can it not be argued that Respondent would be harmed by having Petitioner withdraw or conceal its assets, and even move them

out of the State of Georgia. In this event, Respondent would suffer irreparable harm!

This Court has held in *Fuentes v. Shevin,* 92 S. Ct. 1983 (1972) at pages 1999 and 2000 that there are "extraordinary situations" that justify postponing notice and opportunity for a hearing". One is an important governmental or general public interest. Second, that there has been a special need for very prompt action. Why shouldn't a corporation have the right to garnishee to secure the payment of a just debt if it has a special need for very prompt action?

A three-judge Federal panel ruled on the Georgia garnishment statute in *Reeves v. Motor Contract Company of Georgia,* 324 F. Supp. 1011 (1971), at p. 1016 as follows:

> "We find no objection to Georgia's statutory scheme of garnishment in attachment when asserted against property other than wages; rather, it is the unusual nature of wages which inevitably forces the impecunious debtor to pay possibly excessive loan charges in order to regain his lost income. Save in truly extraordinary situations, the trend has been to afford the impoverished a pretermination hearing on the merits when the result otherwise would be to place the now financially incapacitated person in a compromising position and without hope of judicial recourse. cf., Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970). If *Sniadach* is to have

precedential value to this and other courts, then Georgia's procedure of freezing an alleged debtor's wages without the necessary rudiments of due process cannot stand."

The case of *American Olean Title Company v. Ralph E. Zimmerman, Jr.*, 317 F. Supp. 150 (1970) (Dist. Ct. Hawaii) held on pages 151 and 152 as follows:

> "'A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U.S. 820, 49 S. Ct. 344, 73 L.Ed. 975, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to *all* property in its modern forms. *We deal here with wages — a specialized type of property* presenting distinct problems in our economic system. We turn then to the nature of *that* property and problems of procedural due process.'" (Emphasis added.) 395 U.S. at 340, 89 S. Ct. at 1822.

The Hawaiian Court further cited from the United States case of *McKay v. McInnes*, holding as follows:

> "*McKay* was but a one sentence per curiam upon affirming the judgment of the Supreme Court of Maine, viz., McInnes v. McKay, 127 Me.110, 141 A. 699 (1928). The Maine court's opinion was a positive rejection of the view that attachment (which, as the opinion indi-

> cates, could be equated with garnishment) constitutes an unconstitutional deprivation of property without due process of the law."

The Hawaiian Court then held that the Legislature of Hawaii had had many opportunities to review the garnishment proceedings over the years. It further held as follows:

> "(2) The Legislature of Hawaii has had opportunities to review the garnishment procedure many, many times over the years. Until such time as either the legislature or the Supreme Court of Hawaii changes the law in this state, this court does not feel constrained to give *Sniadach* any application to Hawaii's garnishment statute other than to the garnishment of wages.
>
> The motion to quash the garnishment summons is denied."

The Georgia courts have held Georgia's garnishment statute to be constitutional.

We respectfully submit that for this court to hold that in *every case* prior notice and a hearing must be had is going too far! This creditor is entitled to the due process of law and the protection of the law to help to keep it from losing $51,279.17!

As this Court held in *Sniadach* — it was dealing in wages, *a specialized type of property* we strongly feel

that this court should not hold that notice and a prior hearing be had in every case. To do so would work gross injustice on this Respondent and cause it to lose its entire account.

The Supreme Court of Georgia has followed the rulings of this court and has correctly interpreted the law, and therefore, certiorari should be denied.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied because it fails to set forth any jurisdictional grounds therefor and fails to state any meritorious grounds therefor.

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RESPONDENT

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, LEMUEL HUGH KEMP, Attorney for Respondent, DI-CHEM, INC., in Case No. 28,217 in the Supreme Court of Georgia against North Georgia Finishing, Inc., Appellant, and First National Bank of Dalton, Garnishee, do hereby swear that on the 30 day of March, 1974, I served a copy of the foregoing Brief for Respondent In Opposition to Petition for Certiorari, by mailing a copy of the foregoing Brief to their counsel of Record, Warren N. Coppedge, Jr., Esquire, of Dalton, Georgia and J. T. MINOR, III, Esquire, McCamy, Minor, Phillips, and Tuggle, of Dalton, Georgia.

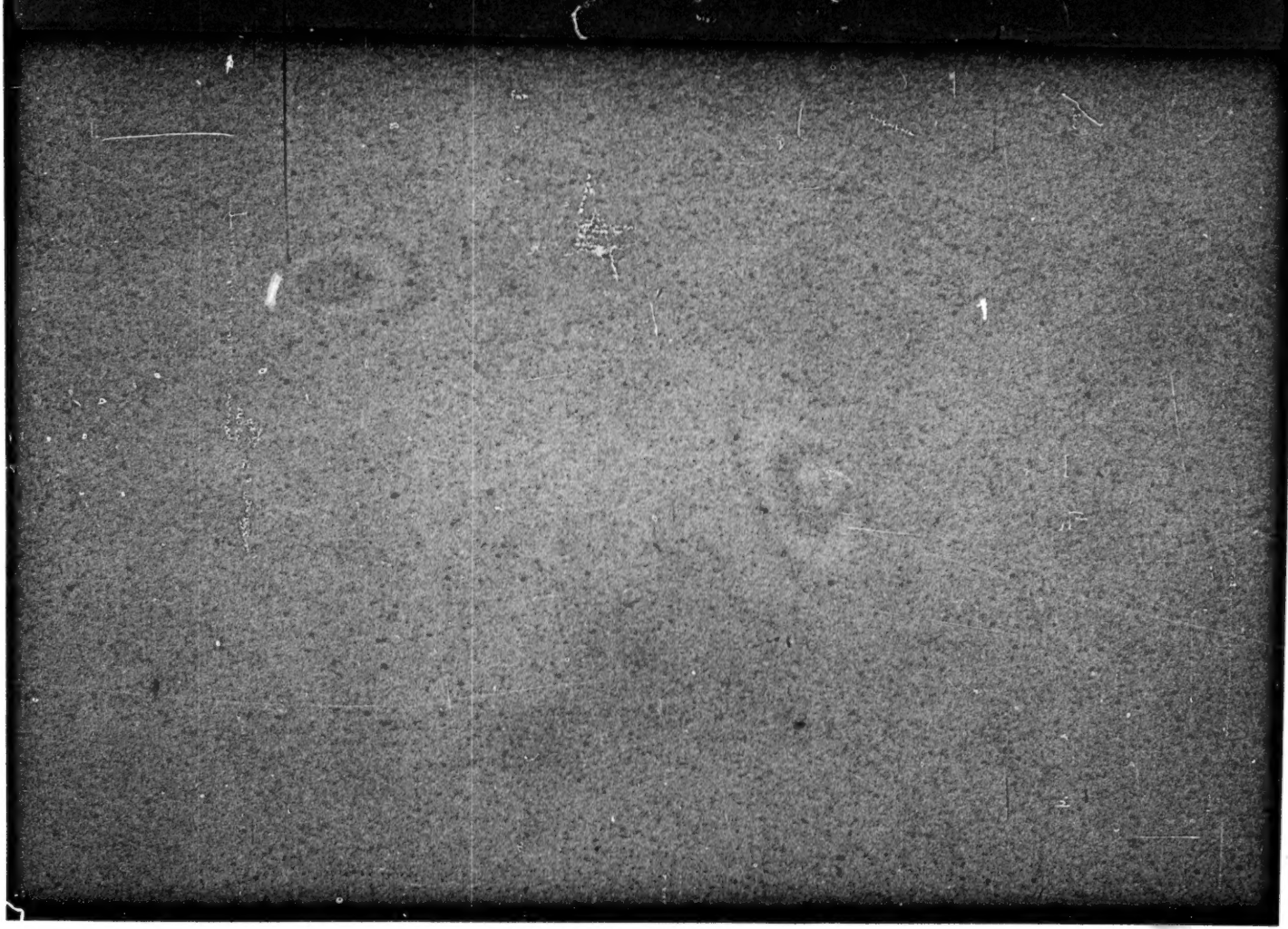
Lemuel Hugh Kemp

LEMUEL HUGH KEMP
Respondent's Attorney

Sworn to and subscribed before me this 30 day of March, 1974.

Judy Wilkins

N.P., GA. STATE AT LARGE



THE SUPREME COURT OF THE UNITED STATES,

WASHINGTON, D. C.

PETITIONER'S BRIEF

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THE SUPREME COURT OF THE UNITED STATES,

WASHINGTON, D. C.

PETITIONER'S BRIEF

PART I

(Rule 40 (1) (a))

Statement of the Case

This case is now before this Court upon the grant of a writ of certiorari to the Supreme Court of the State of Georgia to submit for review here the opinion and decision of the Supreme Court of the State of Georgia entered October 25, 1973, in its Case Number 28217, entitled NORTH GEORGIA FINISHING, INC., Appellant, V. DI-CHEM, INC., Appellee; FIRST NATIONAL BANK OF DALTON, Garnishee.

The opinion of the Georgia Supreme Court is officially reported in 231 Georgia Supreme Court Reports, Page 260, (1973). Writ of certiorari to the Georgia Court of Appeals was granted by the Georgia Supreme Court and is officially reported in 230 Georgia Supreme Court Reports, Page 623 (1973). The decision of the Court of Appeals of Georgia is officially reported in 127 Georgia Court of Appeals Reports, Page 593, (1972). This case was originally appealed from the Whitfield County Superior Court to the Supreme Court of Georgia which transferred without opinion to the Georgia

Court of Appeals. These opinions and notice of denial of rehearing and notice of transfer appear as an appendix to Petitioner's application for certiorari.

The decision of the Supreme Court of the State of Georgia hereby appealed from was rendered October 25, 1973, denying Appellant-Petitioner's Motion for Rehearing of opinion entered on October 4, 1973.

PART II

(Rule 40 (1) (b))

Statement of Jurisdiction

Jurisdiction of this Court to review this cause is believed to exist in United States Code Title 28 Section 1257.

PART III

(Rule 40 (1) (c))

Statement of Statutes and Constitutional Provisions Involved

A. Georgia Code Section 46-101

"*Right to writ; wages exempt until after final judgment*—In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly, or monthly wages of any person residing in this State: Provided, further, that the wages of a share cropper shall also be exempt from garnishment until after final judgment shall have been had against said share cropper: Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained. (Act 1882, Cobb, 77. Acts 1855-6, page 36; 1933, page 35; 1952, page 153.)"

B. Georgia Code Section 46-102

"*Affidavit; necessity and contents. Bond*—The plaintiff, his agent, or attorney at law shall make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which the said garnishment is being filed or in which the main case is filed, stating the amount claimed to be due in such action, or on such judgment, and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue, and shall give bond, with good security, in a sum at least equal to

double the amount sworn to be due, payable to the defendant in the suit or judgment, as the case may be, conditioned to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the event that the plaintiff shall fail to recover in the suit, or it shall appear that the amount sworn to be due on such judgment was not due, or that the property or money sought to be garnished was not subject to process of garnishment. No person shall be taken as security on the bond who is an attorney for the plaintiff or a nonresident unless the nonresident is possessed of real estate in the county where the garnishment issues of the value of the amount of such bond. (Act 1882, Cobb, 77. Acts 1855-6, page 36; 1873, page 29; 1884-5, page 54; 1964, page 220.)"

C. Georgia Code Section 46-103

"*Affidavit by agent or attorney*—When the affidavit shall be made by the agent or attorney at law of the plaintiff, he may swear according to the best of his knowledge and belief, and may sign the name of the plaintiff to the bond, who shall be bound thereby in the same manner as though he had signed it himself. (Act 1822, Cobb, 77. Acts 1855-6, page 36.)"

D. Georgia Code Section 46-104

"*Affidavit and bond by one of firm, etc.*—When the debt for recovery of which the garnishment is sought shall be due to partners or several persons jointly, any one of said partners or joint creditors may make the affidavit and give bond in the name of the plaintiff, as prescribed in cases of attachment.

E. Georgia Code Section 46-401

"Dissolution of garnishments; bond; judgment on bond —When garnishment shall have been issued, the defendant may dissolve such garnishment upon filing in the clerk's office of the court, or with the justice of the peace, where suit is pending or judgment was obtained, a bond with good security, payable to the plaintiff, conditioned for the payment of any judgment that shall be rendered on said garnishment. The plaintiff may enter up judgment upon such bond against the principal and securities, as judgment may be entered against securities upon appeal, whenever said plaintiff shall obtain the judgment of the court against the property or funds against which garnishment shall have been issued. (Acts 1884-5, page 96.)"

F. United States Constitution
Amendment XIV, Section 1

"Amendment XIV.—Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (USC Amendment XIV, Section 1; Georgia Code Title 1, Section 815).